BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[Name]
Grievant

and

Agency for International Development

Record of Proceedings
Case No. 94-59

Part 03
1994-084

Date: February 16, 1996

DECISION (Excision)

For the Foreign Service Grievance Board:

Presiding Member:	James M. Harkless
Board Members:	James S. Landberg Raymond L. Perkins
Special Assistant:	Douglas P. Broome

Representative for the Grievant:	[Attorney]
Representative for the Agency:	Mary Anne Conboy Chief Labor Relations Staff
Employee Exclusive Representative:	American Foreign Service Association

DECISION (Excision)

I. THE GRIEVANCE

Grievant, [name], is a former class OC Senior Foreign Service officer with the Agency for International Development (USAID, the agency). He was mandatorily retired from the Service on March 31, [year] upon expiration of his time-in-class (TIC) limitation, in accordance with section 607 of the Foreign Service Act of 1980 (the Act). On the day of his retirement grievant submitted a grievance to the agency alleging that his separation was contrary to law and regulation because it had failed to submit his name to the 1992 Consolidated Selection Board (C/Board) for consideration of whether he should be recommended for a limited career extension (LCE) of his employment. When the agency failed to issue a decision in his grievance, grievant appealed to this Board on August 30, [year].

Under procedures agreed to by the parties, the Board issued an interim decision on January 26, 1995, in which it determined that the agency had committed a procedural error in violation of applicable regulations when it failed to submit the names of grievant and other similarly situated employees to the 1992 C/Board for LCE consideration. In accordance with Board regulations at 22 C.F.R. 905.1(c), the grievance was remanded to the agency to allow it to submit evidence and argument as to whether it would

have taken the same action *vis-à-vis* the grievant had the procedural error not occurred.

Subsequently, the agency issued a decision, dated April 18, [year], denying the grievance. In its decision, the agency stated that it had convened a reconstituted 1992 C/Board that had reviewed grievant and recommended he receive an LCE. However, the agency stated that notwithstanding the reconstituted board's recommendation, the agency Administrator would not have granted grievant an LCE in 1992. It also disputed grievant's standing to appeal to the Board subsequent to his retirement and asserted that the Board did not have legal authority to grant the remedies he sought. Since then, both parties have submitted additional evidence and argument to the Board on these issues.

For the reasons explained below, the Board accepts jurisdiction but denies the grievance on the merits. It is unnecessary, therefore, to address the agency's assertion that the Board lacks authority to grant the remedies sought.

II. BACKGROUND

Grievant joined USAID in [year] and was promoted into the Senior Foreign Service in [year]. In [year] he was assigned to the USAID Mission to [country] as Deputy Mission Director for a four-year tour, but the assignment was extended for two years to the summer of [year].[1] His existing LCE was

[1] There is a factual difference between the agency and grievant over the ending date of grievant's [country] assignment. In stating its position, the agency indicates that it was scheduled to end in [year].

due to expire in March [year], prior to the end of the assignment. In the summer of [year], however, his assignment was curtailed, and he returned to the United States to be considered for a new assignment as Mission Director to [country]. In accordance with the agency policy of reviewing officers for an LCE in the last year before TIC expiration, grievant was considered and recommended for one by the 1993 C/Board. Nevertheless, the USAID Administrator did not grant him an LCE, and he was notified that he would be mandatorily retired from the Service. As a result, his planned assignment to [country] was canceled.

Grievant did not request interim relief from separation pending resolution of his grievance and was retired on March 31, [year]. He does not seek reinstatement should his grievance be found meritorious but rather requests the following remedies:

> 1. Compensation for salary he would have received had he remained in the Service and been assigned as director of the USAID Mission to [country] for the period March 31, [year] to September 1, [three years later].
>
> 2. Compensation for lost retirement benefits, health benefits, and accrued annual leave for that period.
>
> 3. Compensation for legal fees and related expenses.

However, grievant has supplied persuasive evidence that it was scheduled to end in the summer of [following year]. As we shall explain, this apparent factual discrepancy is not material to the outcome of our decision.

III. POSITIONS OF THE PARTIES

We initially review the positions of the parties on the jurisdictional issue and then their positions on the merits.

Issue 1: ***Does Grievant have standing to appeal?***

The Agency

The agency argues that pursuit of a grievance before the Board requires continued employee status. A grievant must maintain that status or be involuntarily deprived of it to maintain standing to appeal. Grievant gave up his employee status when he failed to request that the Board grant him interim relief from separation under section 1106(8) of the Act. In so doing, he in effect voluntarily retired from the Service. As a former employee, he is barred from pursuing a grievance by section 1102 of the Act, except with regard to an allowance, premium pay, or other financial benefit.

In support of this position, the agency refers to situations in which the courts have dismissed cases where federal employees resigned or retired after initiating an action questioning their dismissal. Although these decisions involved Civil Service cases, they are applicable to the Foreign Service, the agency states, because they are based on the fundamental rule that the Government may not be sued except as specifically authorized by law.

The agency points out that the Board itself reached a similar conclusion in its decision of February 5, 1990 in Case No. 89-5, where it determined that a member who resigned while a removal action was pending

had lost his status as a member of the Service, resulting in loss of Board jurisdiction to consider the propriety of his separation. Although that case involved a separation-for-cause proceeding, the principle that a grievant must qualify as a member of the Service in order to have standing applies to all grievance categories. The Board also has ruled in another case (No. I-86-002) that a member must take advantage of the interim relief from separation protection offered by Section 1106(8) to qualify for a grievance remedy.

The Grievant

Grievant contends that there is no requirement that he remain employed to have standing to appeal. Section 1102 regarding the filing of grievances by former members makes clear that the Act looks to the status of a grievant only at the time of filing. This implies that a grievant who files while still an employee maintains appeal rights even after separation. The Board has so ruled on many occasions, *e.g.*., in the "cohort" case in which the Board granted jurisdiction in the cases of officers who chose not to seek relief from separation while pursuing their grievance (Case No. 87-42 *et al*, Decision of November 13, 1990, affirmed in *Molineaux v. U.S.* Civ. A. 91-1634, D.C.D.C. Mem April 2, 1992; No. 92-5208 D.C. Cir., Mem. January 7, 1994). Other prior Board decisions cited by the agency are not applicable to the present grievance. One involves interpretation of a USIA regulation; the other applies to Civil Service cases.

The agency cannot deny that grievant was involuntarily retired. He elected to take a special lump sum payment available only to officers who are mandatorily retired under section 607 of the Act.

Issue 2: ***Would the agency have granted grievant an LCE in the absence of its procedural error?***

The Agency

For several reasons, grievant would not have received an LCE in 1992 even if he had been considered and recommended by the 1992 C/Board. First, the agency's consistent policy was to not grant LCEs more than 18 months in advance of TIC or LCE expiration, hence its practice of reviewing officers only once, in the year prior to TIC expiration. This policy was justified because the agency's personnel needs were constantly changing as the result of such factors as Congressionally-imposed mandates, changes in annual appropriations and related Congressional pressures on the agency to reduce expenditures, unforeseen changes in world conditions with associated changes in staffing needs, and uncontrollable staff changes such as resignations and retirements. Therefore, it was not desirable to make LCE decisions any longer in advance than necessary.[2]

The agency had other practical reasons for granting the limited number of LCEs available only to officers approaching their last year of TIC

[2] The agency acknowledges that it gave a few officers two LCE reviews within an 18-month period, notwithstanding its general practice of giving one review. Although the agency does not elaborate further, presumably these officers, if recommended, did not receive LCEs based on the first review. Two reviews within 18 months was, of course, consistent with regulations.

or LCE. Otherwise, such officers would have been lost to the Service. Some would have had to be replaced outside the regular assignment cycle at additional cost to the agency. Grievant, on the other hand, was not facing his last year of TIC or LCE extension, so that failure to grant him an LCE in 1992 would not impact on his employment or on the agency's personnel situation. He could be considered in 1993 in light of agency needs.

Further, applicable regulations (USAID Handbook 25 at 38K4) prevented the Administrator from granting LCEs other than to allow an officer to complete an assignment or where there were special programmatic reasons, such as the need for an officer with special skills in short supply or where a program was being phased out. All the LCEs granted to officers on overseas tours were to enable them to complete their assignments. Only a few LCEs were granted for programmatic reasons: four to retain an employee in a current assignment at headquarters; two for employees to begin new assignments that had definitely been made. No LCE was granted predicated on long-term planning for a future assignment.

Grievant did not fit any of these requirements. His [country] assignment was scheduled to end in [year], prior to his TIC expiration, and he possessed no special skills or qualifications in short supply. Thus, there were no assignment or programmatic reasons to extend his LCE. Subsequent agency planning regarding a possible assignment to [country] could not have

affected the outcome in 1992, even if known.[3] It required no special skills. Other qualified officers were available to go to [country].

The agency concludes that, although the Board found that policy implementation was faulty in that regulations required two C/Board reviews, the policy itself was not arbitrary or unreasonable and was within the Administrator's statutory authority to decide. Under that policy, he would not have granted grievant an LCE.[4]

The Grievant

We enumerate the grievant's essential arguments.

1. In a similar 1991 LCE case (Decision of July 28, 1994, Case No. 93-50) the Board rejected the agency argument that it did not grant LCEs more than 18 months in advance of an employee's TIC expiration and ordered the agency to grant an LCE to the grievant. To be consistent with that decision, the Board must find in the present grievant's favor. The record in that case, including testimony from the author of the LCE regulation, demonstrated that sound personnel planning required a 12-to-24-month lead time for LCEs. The Board noted in its decision that "deferring LCE review until the following

[3] As noted earlier, the agency argues its position on the premise, probably mistaken, that the [country] assignment was to end in [year]. In [previous year], however, the agency presumably would have had the correct information on grievant's assignment situation.

[4] The agency asserts as a general proposition that the Administrator did not grant LCEs to employees to complete an assignment that would end within one year of a prior TIC expiration, since he could retain that employee in the Service under his authority in section 607(d)(2) of the Act. It points out that all of the LCE grievants' tours would have been completed prior to their TIC expiration or within five months thereafter.

year would have left little time for planning/staffing purposes before grievant's scheduled LCE expiration." The same logic should be applied in this case.

2. The agency's arguments regarding its budget and global concerns are not valid. The number of LCEs granted in 1992 (20) was not large enough to effect any last-minute changes in budget or world events. The Administrator had other options; for example, an adjustment in promotions at lower levels could have been made rather than to disrupt continuity by withholding LCEs from deserving senior officers.

3. Section 607(b)(2) of the Act provides that LCEs may be granted and renewed only "in accordance with the recommendations of selection boards." Therefore, the Administrator did not have discretionary authority to pick and choose among those recommended. Grievant was ranked eighth by the reconstituted C/Board; therefore the Administrator would have had to grant him an LCE ahead of lower-ranked officers.

4. Agency practice was to grant LCEs to all those recommended. The Acting and Deputy Administrators who made the 1992 LCE decisions offered LCEs to all of the 23 officers recommended that year.[5] Grievant would have been recommended, as evidenced by the reconstituted C/Board results, and therefore he would have been offered an LCE.

[5] Of the 23 officers recommended by the 1992 C/Board, two decided to retire and one was appointed as an ambassador. The agency granted LCEs to the remaining 20 officers.

5. The agency is correct in its speculation that the reason all of the officers recommended for LCEs in 1992 met the eligibility criteria of Handbook 25, section 38K4 may have been that the C/Board applied these criteria in its decisions. That would have been the proper procedure. The Board has held in a previous case (Decision of September 30, 1992 in Case No. 92-2, p. 16) that the Administrator may establish the criteria but that these are to be applied by the C/Board. The logical conclusion is that, since the reconstituted 1992 C/Board used the same precepts and background materials as the original C/Board, its recommendation of an LCE for grievant must have been predicated on a determination that he met the eligibility criteria of Handbook 25, section 38K4. Therefore, the agency argument that the Administrator could not grant an LCE to grievant because he did not meet these criteria could not be correct. Otherwise, the reconstituted C/Board would not have recommended grievant for an LCE.

6. The agency argument that recommended officers who did not need more time in class to complete an overseas tour or who needed less than five-months were not eligible for LCEs under 1992 procedures also is invalid. Handbook 25 was revised in 1991 to change the length of authorized LCEs from "six months to three years" in the prior version to simply "LCEs will not exceed 3 years." The agency admits some 1992 LCEs were granted for more than the time remaining in an assignment (one was for three years when the individual had only a few months remaining in an assignment) and it has not

identified a single instance in which it denied an LCE in 1992 because the officer needed an extension of less than five months. Therefore, its argument that the Administrator routinely relied on his Section 607(d)(2) authority is invalid, and there would have been no basis for denying an LCE to grievant in 1992 on grounds that he did not need one to complete his [country] assignment.

7. The agency claim that grievant relies on his selection for the [country] assignment as the reason he would have received an LCE in 1992 is inaccurate. Grievant's claim is based on the argument that his [country] tour would end in [year], after his TIC expiration. Thus, he would have received an LCE in 1992 to allow him to complete the [year] tour. When grievant was recalled in [year] to be reassigned to [country], he then would have received another LCE to allow him to complete the [new] assignment. Without the 1992 LCE, the [new] assignment could not be approved because of the rule at HB25, section 38K4d(2) that "SFS officers with one year or less remaining in their TIC/LCE will not be considered for an onward assignment."

Grievant concludes that he would have been recommended and ranked number eight by the 1992 C/Board and the Administrator would have granted him an LCE to complete his [country] assignment in the summer of [year]. He would have been reassigned to [new post] in [year] and would have received another LCE that year to allow him to complete the new assignment.

IV. DISCUSSION AND FINDINGS

1. Grievant's standing to appeal.

The agency asserts that grievant does not have standing to appeal because he failed to ask the Board to grant him interim relief from separation under its authority in section 1106(8) of the Act. In effect, it argues, he thereby converted his involuntary retirement into a voluntary retirement, giving up his right to pursue his grievance before the Board. This novel theory is not supported by relevant law and regulation or by the Board and court precedents which the agency cites.

In the first place, there is no statutory or regulatory basis for the agency position that the grievant became a *de facto* voluntary retiree when he failed to seek and obtain relief from separation. The only statutory provision that authorizes voluntary retirement from the Service is section 811 of the Act, which provides that it be at the employee's own application. There is nothing in that section, or in section 607 regarding involuntary retirement, or in the prescriptive relief provision of the Act (section 1106(8)), that could reasonably be interpreted to mean that a grievant who fails to request interim relief from separation shall be deemed to have voluntarily retired or resigned from the Service. Nor does the agency cite any other legal provision to that effect.

Second, the Board has never held that a grievant must seek interim relief from separation to maintain status to pursue a grievance before the

Board. The Board normally accepts jurisdiction as long as a grievance is filed at the agency level prior to separation, is within the time limitations stated in section 1104 of the Act, and otherwise meets jurisdictional requirements. Subsection 1104(b) provides that if a grievance is not resolved under Department (*i.e.*, agency) procedures within ninety days after it is filed, the grievant or the exclusive bargaining agent shall be entitled to file a grievance with the Board. There is nothing in section 1104 that states or implies that the employee must remain employed or must seek interim relief under section 1106(8) to retain status before the Board.[6]

The Board decisions which the agency cites do not apply in the present case because the circumstances are different. In the separation-for-cause case (No. 89-005-AID-4) the grievant voluntarily resigned after a hearing, but prior to a Board decision. Since the grievant did not seek reinstatement, the Board determined that a decision on the merits could not affect the employee's status and declined to issue one. Even if this Board action could be interpreted to mean that an employee loses standing upon resignation, the facts in that case do not apply here. Grievant did not resign or voluntarily retire in the midst of these proceedings. He was notified by the agency that

[6] Section 1102 of the Act bars a grievance by a former employee or a surviving heir except to pursue an alleged denial of an allowance, premium pay, or other financial benefit. The Board interprets that provision to apply in cases where the employee failed to file a grievance at the agency level prior to separation.

he would be mandatorily retired. Unlike the employee in Case No. 89-005, no action on grievant's part was necessary to effect his separation.

In the other Board decision cited by the agency (Case No. I-86-002), the exclusive bargaining representative asked the Board to require the U.S. Information Agency to waive its regulation requiring an employee to remain employed pending an agency decision in a grievance. The concerned employee apparently had a financial interest in allowing her involuntary retirement to proceed. The Board declined to order the agency to waive its own rule. Although the Board pointed out that an agency has an interest in the employee and could be disadvantaged by a separation, it did not address the question of whether the employee would lose rights to appeal if the employee willingly acquiesced in mandatory retirement; nor does the decision imply such a determination. Aside from the fact that the grievant in the current case did not seek retirement, we are unaware of any similar USAID regulation or regulation applicable to USAID that requires an employee to remain employed until it issues a decision in a grievance. If one existed, the agency presumably could not have processed grievant's mandatory retirement.

Because grievant's separation was not voluntary, the court decisions cited by the agency also are not applicable here. They are predicated on Civil

Service employees' voluntary separation while an adverse agency action was pending.[7]

We find, therefore, that grievant did not lose his standing to appeal when he was retired or because he did not seek interim relief from separation. This Board retains jurisdiction in his case.

2. Whether the agency has met its burden of proving that it would have taken the same action in the absence of its procedural error.

The provisions of the Act confer a broad grant of discretionary authority on agency heads to decide whether, under what conditions, and in what numbers LCEs will be granted. The governing provision, section 607(b)(2) of the Act, does not require grant of an LCE to an individual in any specified circumstances. It simply provides that LCEs:

> ... *may* be granted and renewed by the Secretary in accordance with the recommendations of selection boards established under section 602. (emphasis added) [8]

Congress clearly intended that the Secretary and the agency heads use the authority to set TIC limits and to grant limited extensions of these limits in the light of management needs. This is confirmed in the committee report on the 1980 Act, which notes:

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[7] Unlike the Foreign Service, the Civil Service does not have mandatory retirement based on time-in-class limits. Civil Service retirements are usually voluntary. The MSPB and court decisions which the agency cites apply to voluntary actions by the employee—retirement or resignation. They are not applicable to the current circumstances, where the grievant was *involuntarily* retired.

[8] In general, the powers granted to the Secretary in the Act are delegated to agency heads.

the agency to defer LCE decisions until the final year of an employee's eligibility.

It is true that the Administrator could have made different management choices, but this was well within his management prerogatives to decide. Given the discretionary language of section 607(b)(2), the Administrator was clearly entitled to determine how many LCEs to grant each year in light of his determination of agency needs. He was not obligated by law to grant additional LCEs in 1992 in order to accommodate the grievant. This Board is not empowered to overrule his management decisions in that respect, so long as they are consistent with law and regulation.

The question remains whether the Administrator, if he chooses to grant any LCEs, is obliged by the Act to grant them in the rank order which the selection board recommends. There is no doubt that, with regard to promotions, agency heads are required to follow selection board rankings. Section 601(b) states that Foreign Service promotions:

> ... shall be based upon the recommendations and rankings of selection boards established under 602, ...

Section 605 makes Congressional intention with regard to promotions crystal clear. It states:

> Sec. 605. Implementation of Selection Board Recommendations. - (a) Recommendations for promotion made by selection boards shall be submitted to the Secretary in rank order by salary class or in rank order by specialization within a salary class. The Secretary shall make promotions and, with respect to career

> appointments into or within the Senior Foreign Service, shall make recommendations to the President for promotions, in accordance with the rankings of the selection boards.

To eliminate any doubts on this point, the Committee report notes, with regard to Section 605, that promotions would be "... in *strict* accordance with rankings of the selection boards." (emphasis added).[10]

In contrast, the language of section 607(b)(2) regarding LCEs states only that they must be granted "... in accordance with the recommendations of selection boards established under section 602." There is no reference to rankings and no mention at all of LCEs in Section 605 of the act. The Committee report says nothing that implies that grant of an LCE must be based on the selection board rank ordering. We interpret the language to mean that only those officers recommended by selection boards may be granted LCEs by the agency head. The Committee report confirms that intention, where it states:

> A provision that would make renewal [of an LCE] dependent on the Secretary's unilateral determination of the "needs of the Service" was deleted by a committee amendment. The precepts governing selection board actions should take those needs into account.[11]

[10] *ibid.*, page 73.

[11] *ibid.*, page 74

This surely means that the Secretary cannot unilaterally extend an LCE without a selection board recommendation. It does not mean that the Secretary may not deny an extension recommended by the selection board.

Taking into account the statutory language and the legislative intent and history, we conclude that the Secretary and other agency heads are not obligated by law to grant LCEs in the rank order recommended by a selection board. To find to the contrary would be inconsistent with the legislative purpose of assuring maximum flexibility and efficiency in the management and utilization of the Senior Foreign Service. Such an outcome could result in situations where an LCE would be granted to an officer with no assignment and no prospects of an assignment, or where one could not be granted to a lower ranked officer with needed special skills not possessed by a higher ranked officer. Instead of a flexible instrument, LCEs would constrain the Administrator's ability to manage the Service in light of changing agency needs.[12] It is doubtful that Congress intended such situations to occur.

Although we conclude that the Administrator is not required to follow the rankings of the selection board in granting LCEs, that does not mean such decisions may be arbitrary. The legislative history also indicates that

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[12] The Board upheld the Secretary of State's authority to determine how many LCEs to grant in a given year in its decision of February 11, 1992 in Case No. G-90-082 *et al.* Although in that decision the Board stated that it was not persuaded the Congress wished to prescribe a different procedure for following selection board rankings for LCEs than it did for promotions, that was not the issue before the Board in that case. The statement was made in passing and was not based on a thorough analysis of the LCE provisions and congressional intent.

the Congress intended to protect employees from politically-based or other arbitrary reasons for granting or denying LCEs. The Administrator must base LCE decisions on sound reasons, within the framework of established policies and regulations. The agency asserts that the LCE decisions in 1992 were soundly based and that, under the policies and regulations in force, the Administrator would have properly exercised his discretionary authority to deny an LCE to grievant had his name appeared on the 1992 C/Board's recommended list.

The fundamental reason offered by the agency for why the Administrator would not have granted an LCE to grievant in 1992, even if he had been recommended, is that its consistent policy was to not grant LCEs more than 18 months in advance of an employee's TIC expiration date. In practice, that meant excluding officers whose TIC expired after December 31, 1993. It says this was primarily because of budget and program constraints and uncertainties as well as the related difficulty of forecasting senior personnel needs.

We find the agency's evidence and argument persuasive. It is beyond dispute that USAID, like other foreign affairs agencies, has been under severe budgetary pressures that required a downsizing of personnel. The process continues at this writing. According to the record, one of the results is that each year the agency reduced the number of LCEs granted, from over 40 in 1991 to only six in 1993.

That the agency intended to and did differentiate between LCE candidates based on their TIC expiration dates also is demonstrated by its policy of not reviewing officers for LCEs until the year before their TIC expiration. This policy was consistent with the Administrator's statutory authority to manage the LCE process, in our opinion. The mistake the agency made was in failing to bring the governing regulation into conformance with its policy. Even if the original intention when the LCE regulation was drafted in the 1980s had been to provide two reviews, as evidence in the record suggests, the Administrator had the statutory authority to change this practice. However, the Administrator needed to bring the governing regulation into conformance. Subsequently, the agency has revised the regulation to allow only one LCE review prior to TIC expiration. In short, the agency policy itself, while it proved inconsistent with regulations, constitutes strong evidence that it would have differentiated among LCE candidates based on their TIC expiration dates even in the absence of the procedural error.

In response to the pressures to reduce LCEs, the agency also narrowed the regulatory criteria for granting them. Prior to 1992, agency regulations provided that any members recommended by the C/Board would be given the opportunity to participate in the assignment process and that members with onward assignments, or who were identified for one, would receive LCEs (the provision in force at the time was HB 25, Ch. 38, Para 38J2b). It was largely

for this reason that the Board determined in Case 93-50 that the grievant there would have received an LCE in 1991. He had an identified assignment that would normally have ended well beyond expiration of his existing TIC. The regulation arguably required the Administrator to grant him an LCE in these circumstances.

The agency changed the regulation significantly in December 1991, however, to restrict sharply the basis for granting LCEs. The new formulation (HB 25, section 38K4d) provides that the Administrator can grant an LCE *only* to allow an employee to complete an overseas assignment, or where some program need or employee skill in short supply justified retaining the member. Gone was the provision that entitled employees to participate in the assignment process if they were recommended for LCEs by the C/Board. The language of the revised regulation, moreover, gave the Administrator greater discretion than he had under the prior version. The revised regulation states that the Administrator *may* grant an LCE when the stipulated conditions exist, not that he *must* do so.[13] This gave the Administrator greater latitude to make the final decision on the basis of agency needs and priorities. The regulatory changes are consistent with and

[13] The previous regulation contained wording that appeared discretionary—*i.e.*, "LCEs *may* be granted in accordance with recommendations of the appropriate Selection Board"—but the remaining language stated that such a grant would be contingent on the officer having an onward assignment or having been identified for same, in which case such officers "will receive an LCE." This effectively eliminated the Administrator's discretion where these conditions were met. In the revised regulation, the language does not require an LCE if the stipulated criteria are met, but only says that "LCEs may be granted" in such circumstances. This clearly leaves the Administrator discretion to withhold an LCE.

support the agency argument that its policy was to delay decisions on LCEs until the last year before an officer's TIC expiration.

Consequently, we find that the agency has established by the preponderance of the evidence that, under the policy in force, the Administrator would not have granted grievant an LCE even had he been recommended by the 1992 C/Board. Grievant would have been clearly distinguishable from the 20 officers who received LCEs that year, because all of their TICs expired in 1993. Grievant's expired in 1994. The LCE decision in grievant's case could and would have been delayed until 1993, the year prior to his TIC expiration.

Our finding above is sufficient to deny the grievance. The agency argues as well that, in addition to being disqualified because of his 1994 TIC expiration, grievant would not have met the regulatory conditions for grant of an LCE in 1992. An LCE would not have been required to allow him to complete an overseas assignment, grievant had no special skills in short supply, and there were no programmatic reasons for retaining him in the Service. The agency asserts that all of the 20 officers granted LCEs in 1992 met these regulatory requirements. The evidence in the record substantiates that. Fourteen of the LCEs went to officers to allow them to complete assignments. According to the agency, the other six were based on special skills or programmatic needs. The grievant has not established that he would have qualified for an LCE under these criteria, regardless of whether

the end of his assignment fell shortly before or after his TIC expiration. Although grievant was later identified for a new assignment as a mission director, it is highly unlikely this was known in 1992. We need not dwell on these matters, however. The agency has established that because of his 1994 TIC expiration date, grievant would not have been considered for a 1992 LCE. Thus, the regulatory criteria would not have been applicable in his case.

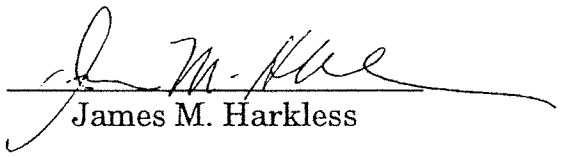
To conclude, we find nothing unreasonable, arbitrary, or contrary to applicable law and regulation in the agency management of the LCE process, with the exception of its failure to provide the two C/Board reviews required by the existing regulation. The agency has met its burden of proving by the preponderance of the evidence that it would have taken the same actions *vis-à-vis* the grievant in 1992 even in the absence of that error.

Grievant was reviewed and recommended for an LCE in 1993, but the Administrator failed to grant him an LCE that year, and he was designated for mandatory retirement in 1994. There is no evidence that his separation violated law or regulation.

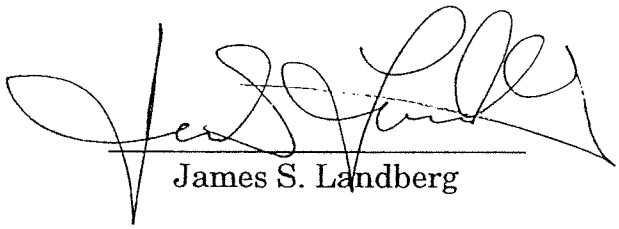
V. DECISION

The grievance is denied.

For the Foreign Service Grievance Board:



James M. Harkless



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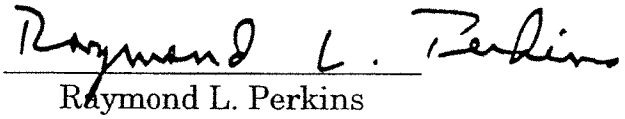

Raymond L. Perkins